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In the Supreme Court of the United States

OCTOBER TERM, 1978

JACOB JAMES DOST, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS EDWARD KILFOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 575 F.2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1978, and a petition for rehearing in No. 78-5007 was denied on June 9, 1978. The petition for a writ of certiorari in No. 77-1687 was filed on May 26, 1978, and the petition in No. 78-5007 was filed on July 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a jury could properly find that sexually explicit photographs of young girls were obscene.
2. Whether the evidence justified an instruction on pandering.
3. Whether the evidence was sufficient to show that petitioner Kilfoyle had knowledge of the contents of the materials that he distributed.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioners were convicted on four counts of mailing obscene material or advertisements for obscene material, in violation of 18 U.S.C. 1461 and 2. Petitioner Dost was sentenced to two years' imprisonment and fined $15,000. Petitioner Kilfoyle was sentenced to six months' imprisonment. In addition, petitioners were placed on probation for five years, with the conditions that they not engage in the production or distribution of sexually explicit material and that Dost pay

his fines. The court of appeals affirmed (Pet. App. A).

On the four occasions charged in the indictment, petitioners, doing business under the corporate name Pamsco, mailed materials containing sexually explicit photographs of young girls between the ages of 8 and 14. Count I involved the mailing of a letter advertising 12 color photographs of "Sandy," age 11 (Gov. Exh. 1A). Two sample nude photographs of Sandy were included with the letter (Gov. Exh. 1). In response to this advertisement, petitioners received an order addressed to a Los Angeles post office box originally registered to petitioner Kilfoyle and then reregistered by Kilfoyle in the Pamsco name. Petitioners filled the order, mailing 12 photographs of Sandy accompanied by a letter advertising other photographs of girls between the ages of 9 and 15 (Gov. Exh. 2A). This mailing formed the basis of Count II. The pictures showed Sandy, either partially or fully undressed, in various positions displaying her genitals (Gov. Exh. 2D). Count III involved the mailing of a similar set of photographs of "Patty," age 10 (Gov. Exh. 3B). Some of the pictures showed Patty masturbating and urinating. The mailing that formed the basis of Count IV included photographs of several young girls ranging in age from 8 to 15. Each girl was nude and posed to expose her genitals; in some instances, the photographs depicted masturbation (Gov. Exh. 4A, 4B).

ARGUMENT

1. Petitioners contend (77-1687 Pet. 5-13; 78-5007 Pet. 12-13) that the photographs they mailed were not obscene. Focusing on the "guidelines" announced in *Miller* v. *California*, 413 U.S. 15, 24, petitioners insist that their photographs did not "portray sexual conduct in a patently offensive way * * *." Petitioners ignore the fact, however, that the Court in *Miller* listed "a few plain examples" of the sort of materials that can be regulated as depictions of "sexual conduct" (*id.* at 25). The list included (*ibid.*):

> Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[1]

Here, one of the photographs mailed by petitioners (Gov. Exh. 3B) depicted an excretory function and other photographs (Gov. Exhs. 3B, 4A-4B) depicted masturbation. Many of the photographs showed young girls exhibiting their genitals in a lewd manner (Gov. Exhs. 2, 3, 4). The court of appeals correctly ruled that there was "ample evidence to support the jury's determination that the photographs were obscene" (77-1687 Pet. App. 2).

Petitioners assert that their convictions improperly rest on the age of the models photographed and that if the models had been adults, the materials would

[1] The district court, in its instructions to the jury, described obscene material in these terms (Tr. 585).

not have been obscene.[2] This contention is without merit. Under the standards set forth in *Miller*, the jury would have been entitled to find the photographs obscene even if the models had been adults. In its instructions to the jury, the district court did not mention the age of the models; it simply defined obscenity by reference to the *Miller* standards (Tr. 583-588).[3] But, in any event, in assessing whether the photographs were "*patently offensive* representations * * * of masturbation, excretory functions, and lewd exhibition of the genitals" (413 U.S. at 25; emphasis added), the jury could properly weigh all features of the photographs, including the age of the models. *Miller* does not require juries to exclude certain highly pertinent factors from their obscenity determinations.[4]

[2] To support his argument, petitioner Dost cites (77-1687 Pet. 8-11) several cases in which this Court summarily reversed obscenity convictions: *Sunshine Book Company* v. *Summerfield*, 355 U.S. 372; *Mounce* v. *United States*, 355 U.S. 180; *One, Inc.* v. *Olesen*, 355 U.S. 371; *Avansino* v. *New York*, 388 U.S. 446; *Redrup* v. *New York*, 386 U.S. 767; *Potomac News Co.* v. *United States*, 389 U.S. 47. Each of these cases preceded *Miller* v. *California*, 413 U.S. 15, and therefore was not judged by the *Miller* obscenity test. Furthermore, none of the cases involved photographs of young girls masturbating, urinating or lewdly displaying their genitals.

[3] One of the government's expert witnesses, Dr. Carl Koenig, did testify that he based his conclusion that the materials were obscene on the fact that the models were children (Tr. 180).

[4] Nor is this Court's decision in *Pinkus* v. *United States*, No. 77-39, decided May 23, 1978, relevant to the obscenity determination in the present case. In *Pinkus*, the Court held that children are not a part of the community by whose stand-

2. The district court instructed the jury that in determining whether the photographs were obscene, it could consider any evidence of "pandering." Pandering was defined as "the business of purveying textural [sic] or graphic matter openly advertised to appeal to the exotic interest of the customer. It is a deliberate representation of material as erotically arousing and an attempt at titillation" (Tr. 588). See *Ginzburg* v. *United States*, 383 U.S. 463, 467-471; *Hamling* v. *United States*, 418 U.S. 87, 130-131. Petitioners contend (77-1687 Pet. 14-25; 78-5007 Pet. 13-14) that the evidence did not justify this instruction. In *Pinkus* v. *United States*, No. 77-39, decided May 23, 1978, slip op. 10-11, however, this Court held that a pandering instruction is proper

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ards obscenity is to be judged in a case where the recipients of pornographic materials are adults. *Pinkus* does not stand for the proposition that sexually explicit photographs of children are no more offensive than photographs of similarly posed adults.

Petitioner Dost also argues (77-1687 Pet. 6) that Congress would not have needed to enact the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 7 (to be codified at 18 U.S.C. 2251 *et seq.*), if 18 U.S.C. 1461 already prohibited mailing obscene photographs of young girls. This argument is insubstantial. The new Act is much broader than Section 1461, in that it punishes not only the distributor of child pornography but also the photographer and the parents or guardian of the child. It fixes a maximum penalty for first offenders twice as severe as that provided by Section 1461. The fact that the new statute overlaps in part with Section 1461 as applied in this case does not indicate that that application is incorrect and that distribution of child pornography through the mails was not previously a punishable offense under the federal criminal code.

even in the absence of extensive evidence concerning a defendant's promotional activities and editorial goals. The Court stated: "[W]hile it is true the government offered no extensive evidence of the methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients, the evidence was sufficient to trigger the *Ginzburg* pandering instruction."

Here, petitioners included in each mailing printed and handwritten advertisements emphasizing the salacious nature of the photographs (Gov. Exhs. 1A, 2A, 4A, 4B); they similarly advertised the photographs in the April 25, 1975, issue of the Hollywood Press (Gov. Exh. 11).[5] The government also presented evidence that petitioners had obtained a post

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[5] After receiving a complaint from a postal patron in California concerning petitioners' unsolicited mail advertising, the Los Angeles postal inspector requested that the postal inspector in Roswell, New Mexico, order the materials advertised in the Hollywood Press. Petitioner Kilfoyle contends (78-5007 Pet. 14) that because obscenity in this case was to be judged by the standards of the New Mexico community, the Hollywood Press advertisement published in California should not have been admitted as evidence of pandering. Kilfoyle misconceives the evidentiary purpose of the newspaper advertisement. The advertisement was admissible because it showed that petitioner peddled his photographs in a manner that ignored any political, artistic, literary, or scientific value they might have had, and emphasized instead their sexually provocative aspects. The government did not contend that the advertisement itself had been distributed in New Mexico and therefore should be judged by New Mexico community standards.

office box to receive orders for the advertised material (Tr. 117-123). The district court's instruction simply "permitted the jury to consider the touting descriptions along with the materials themselves to determine whether they were intended to appeal to the recipient's prurient interest in sex, whether they were 'commercial exploitation of erotica—solely for the sake of their prurient appeal.'" *Pinkus* v. *United States*, *supra*, slip op. 10, quoting from *Ginzburg* v. *United States*, *supra*, 383 U.S. at 466. Since the materials distributed by petitioners were at least arguably obscene under the *Miller* test, the pandering instruction was proper.

3. Kilfoyle contends (78-5007 Pet. 6-12) that the government offered insufficient evidence that he knew the character of the materials he distributed. See *Hamling* v. *United States*, 418 U.S. 87, 123. Petitioner is incorrect. Knowledge may be proved by circumstantial evidence. As this Court said in *Smith* v. *California*, 361 U.S. 147, 154, "[e]yewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents."

The court of appeals properly held that the circumstantial evidence of Kilfoyle's knowledge was sufficient to support a finding of guilt beyond a reasonable doubt (78-5007 Pet. App. 4). Kilfoyle reregistered his post office box in the Pamsco name and, in doing so, described Pamsco's business as mail order novelties and photographs. The post office box was

used to receive orders in response to the Hollywood Press advertisement and in response to solicitations of the kind included in the mailings for which petitioners were indicted. The advertisements accurately described the photographs offered. Both Kilfoyle and petitioner Dost picked up mail sent to the post office box address. When Kilfoyle was arrested, he spontaneously stated that he had "checked with an attorney, and that an attorney had told him that it was all right to mail the merchandise that he was selling through the U.S. mails. * * * He also mentioned that a person by the name of Marvin Gay, he had talked to, and this person also told him it was all right to mail his merchandise" (Tr. 128). This evidence was sufficient to permit the jury to conclude that Kilfoyle was aware of the nature of the material he was mailing.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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